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No. 138.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

J. T. SMITHERS, *Plaintiff in Error,*

vs.

T. SMITH, Et Al., *Defendants in Error.*

Brief of Defendants in Error.

By THEODORE MACK,
SAM J. HUNTER,
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Co-Counsel with Mack.

KEYSTONE PTG. CO., FORT WORTH.

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To the Honorable, the Supreme Court of the United States:

Plaintiff in error endeavors to sustain the jurisdiction of the Circuit Court by alleging that the defendants in error were joint trespassers upon the 1280-acre tract of land, and hold the same in common, and he sues to establish the boundaries of and to recover it, alleging that the matter in dispute exceeds in value $2000.00.

The defendants in error pleaded to the jurisdiction of the Circuit Court, each answering separately and denying that he was a joint tresspasser with the others, and denying that he holds title in common with the others either as joint tenant or tenant in common, and averring that the allegations of plaintiff to that effect were falsely and fraudulently made for the pur-

pose of conferring jurisdiction upon the Circuit Court; that the plaintiff in error well knew that the statements were false and untrue when they were made.

Each defendant in error describes by metes and bounds the land claimed by him and shows that each claim is a separate and distinct title from all the others; each deraigned his title directly from the State of Texas, and that there is no community of title among them, nor of the possession and they committed no joint trespass.

The pleas show that Lee only had 96 acres of the land claimed by the plaintiff in error; that Greer only claimed 187 acres; Reagan only clamed 288 acres and Smith only claimed 443 acres. Each pleading that the amount claimed and the lines to which they claimed were well known to the plaintiff in error and to his attorneys at the time the suit was brought, and that the allegations of joint trespass and of community title, and of the community of possession were falsely and fraudulently made to confer jurisdiction on the Circuit Court.

There is no necessity for this Court to consider the value of any of the lands except those claimed by T. Smith—443 acres, as the value of each of the others fell far short of reaching the sum of $2000.00. The testimony of the witnesses show that this 443 acres was worth from $2.50 to $3.25 per acre, at the time this suit was filed on September 9, 1903. Only two witnesses place it above $3.25 per acre and those are Bartley and Massey, plaintiff's witnesses, who say that they are and have been agents of the plaintiff in error and they fixed that valuation of $4.00 per acre as its value in February, 1905, stating at the same time that it was worth $3.00 per acre when this suit was brought in September, 1903. Several disinterested witnesses besides the defendants in error, testified that the land in controversy was only worth from $2.50 to $3.00 per acre at the time this suit was brought in September, 1903. Both of plaintiff in error's witnesses, Massey and Bartley, admit that they knew the amount of land claimed by each defendant in error, and approximately the boundaries thereof, and that they knew each claimed no interest in the lands of the other defendants; and Massey, the plaintiff's agent, says he told the plaintiff's attorneys, before the institution of this suit, about how much of the land was claimed by each of the

defendants and approximately where the lines of each run, as claimed by each defendant. Which evidence establishes, as we contend, that the allegations of amount and of value and of joint trespass and of community of title and of possession were falsely and fraudulently made in order to confer jurisdiction on the Circuit Court, and so the District Judge, who tried this case, concluded from said evidence.

Mr. Mickey, a local postmaster in Floyd County, a disinterested witness, testified that, the land claimed by T. Smith was worth about $3.25 per acre, and all the other lands claimed by plaintiff was of about the same value. The value fixed by him relates to the time of the trial. The proof shows that the 60 acres of improved land within Smith's enclosure, which he had held for three years, were worth $1.50 rental per acre per annum and the unimproved grazing land was worth from two to three cents per acre per annum.

This testimony gives results as follows:

443 acres at $3.25 per acre	$1439.00
60 acres at $1.50 per acre rental per annum	270.00
383 acres (grazing land) at 5 cents per acre per annum	57.45
1 mile of fence, but still on the land	60.00
Total	$1826.45

Plaintiff in error made no effort to prove any other damages. But put this land at $3.50 per acre and the total value then would be only $1937.95.

The able counsel for the plaintiff in error in their brief base their rights to recover and to fix the values on the day they filed what purports to be their "First Amended Original Petition," filed February 21, 1905. But this purported pleading has no standing in Court, because it was filed out of term time, and no notice given to defendants in error, and no leave of Court obtained afterwards.

Plaintiff in error on page 21 of his counsel's brief states this proposition: "An amendment may set up a new cause of action, and if the amount in dispute at the time it was filed exceeds $2000.00 jurisdiction attaches." Article 1188 of the

Revised Statutes of Texas is quoted in plaintiff in error's brief on page 22. According to the provisions of that article it was necessary to give the opposite party or their attorneys notice of the filing of that amended pleading within five days after the filing of the same. The term of the Circuit Court at Fort Worth began on the 13th day of March, 1905. This so-called pleading was filed February 21, 1905. No notice was ever given of the filing of this pleading as required by the statute, and no leave granted in open Court to file same, and hence the Court had a right to disregard said purported pleading. With this pleading out, there is nothing to support the evidence offered by the two witnesses of plaintiff in error that the land was worth $4.00 per acre in February, 1905. So the case stands as if no amended petition had been filed and the value of the matter in dispute at the time of the filing of the petition is the criterion upon which to determine the jurisdiction of the Court.

The eleventh paragraph of the bill of exceptions shows that the Court refused to consider the value of the land at the time plaintiff's amended petition was filed. It was his duty to do so, as the amended petition had not been legally and properly filed under the statute of Texas and had no standing as a pleading in the case.

In the trial Court the question of jurisdiction, so far as the sum or value of the matter in dispute is concerned, must be determined by that sum or value existing at the time the suit was filed; but, in appeals from the Circuit Court to an Appellate Court the sum or value of the matter in dispute is determinable by the amount of judgment rendered. This latter criterion cannot be applied to determine the jurisdiction of the trial Court.

In conclusion of this brief we submit the following propositions and authorities on the jurisdiction of the Circuit Court:

The presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears.

Grace vs. Ins. Co., 109 U. S., 278.
People vs. Fordyce, 119 U. S., 469.
Turner vs. Bank, 4 Dallas, 8.
Livingston vs. Van Ingen, 1 Paine, 45.

FEDERAL CASES NO. 8420.

Nashville & St. Louis Ry. Co. vs. Taylor, 86 Fed. Rep., 168.

SUITS AGAINST SEVERAL DEFENDANTS.

"Distinct demands can not be united in one suit by a plaintiff against several defendants in order to give the Court jurisdiction."

1 Desty 374. Walter vs. Northeastern Ry. Co., 147 U. S., 370.
Fishback vs. Western Union, 161 U. S., 96.
Bank vs. Cannon, 164 U. S., 319.
Busy vs. Smith, 67 Fed. Rep., 13.

"If several persons have a common undivided interest, although separable as between themselves, the amount of their joint interest is the test of their jurisdiction. But this is not true where the claims are in their nature separate."

Holt vs. Bergevin, 60 Fed. Rep., 1.
Walter vs. Northeastern Ry. Co., 147 U. S., 370.
Putney vs. Whitmire, 66 Fed. Rep., 385.

"Where shareholders are individually liable for the debts of a corporation, the claims of creditors against shareholders are several and can not be joined to make up the required amount."

1 Desty, 375.
Auer vs. Lombard, 33 U. S. App., 438; s. c. 72 Fed. Rep., 209.

"In an action by the taxpayers to restrain the issue of municipal bonds, the amount of taxes which plaintiff would have to pay, and not the entire issue, would be the test of jurisdiction of amount."

1 Desty, 375.
Colvin vs. Jacksonville, 158 U. S., 456.

"An allegation of the amount of taxes to be collected in different counties can not be made for the purpose of obtaining the jurisdictional amount of $2000.00."

1 Desty, 376.

Fishback vs. Western Union, 161 U. S., 96.
Bank vs. Cannon, 164 U. S., 319.

"When one sues for an amount which exceeds $2000.00, but at the trial his own evidence shows that he actually claims less than $2000.00, the Court is without jurisdiction."

1 Desty, 377.
Cabot vs. McMaster, 61 Fed. Rep., 129.
United States vs. Poe, 61 Fed. Rep., 475.
Horst vs. Merkely, 59 Fed. Rep., 502.
Holden vs. Utah, 82 Fed. Rep., 209.

"The Court does not acquire jurisdiction where the amount claimed is not claimed in good faith."

Bank vs. Bradley, 36 U. S. App., 519; s. c. 72 Fed. Rep., 67.
Am. Wringer Co. vs. Ionia, 76 Fed. Rep., 6.

"All doubts as to jurisdiction must be resolved against the Court's jurisdiction."

Ry. Co. vs. State Board of Assessors, 132 Fed. Rep., 629.
McDaniel vs. Taylor, 123 Fed. Rep., 338.

"When defendant claims part of the premises only, the answer shall be equivalent to a disclaimer of the balance."

Tex. R. S., 5269.

"Upon defendants filing disclaimer the Court may render judgment for the land disclaimed."

Burk vs. Mangham, 37 S. W., 459.

"Matter in Dispute." Something upon which the Court must hear evidence.

18 Stat. U. S., 472, part 3.
Stilwell vs. Williamston, 80 Fed. Rep., 69.
Bouman vs. Ry. Co., 115 U. S., 611.
Kabot vs. McMaster, 61 Fed. Rep., 129, especially 130 and 131, down to bottom of page 131.

On disclaimer leaving Court without jurisdiction, see Cooper vs. Preston, 105 Fed. Rep., 403.

Stemmler vs. McNeal, 102 Fed. Rep., 660.
Herring vs. Swayne, 84 Tex., 525.
Wooters vs. Hall, 67 Tex., 515.

The judgment in this case contains the following as to the pleas filed by the defendants to the jurisdiction of the Court: "And the Court finds from the evidence that the said pleas of each of the said defendants, Reagan, Lee, Smith and Greer, are fully proved and sustained and that this Court has no jurisdiction over the subject matter in dispute, as pleaded and set forth in the plaintiff's petition and in the several pleas of the said defendants." Thereupon follows the order of dismissal.

The Court shows by reference to the plaintiff's petition that he did not recognize the first amended original petition as a pleading in the cause. If the pleas of the several defendants were found to be true by the Court, then, the Court found to be true (and that, too, upon sufficient evidence) that the allegations in the petition seeking to confer jurisdiction on the Circuit Court was fraudulently made, and this deprived the Circuit Court of the jurisdiction regardless of the sum or value in dispute as alleged in the plaintiff's petition.

Believing that the Circuit Court decided the question of jurisdiction properly and that no error was committed, or shown by the record in this case, we respectfully ask that its judgment of dismissal for want of jurisdiction be affirmed.

Respectfully submitted,

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Fort Worth, Texas.